REMARKS/ARGUMENTS

Status:

This Response is Advisory Action dated May 26, 2009. The Examiner has entered the amendments, but maintains the rejection of claims 1-23 in light of the prior art.

Claim Amendments

Applicant has not amended claims, but provides a listing of the current claims for reference.

DISCUSSION

Applicant respectfully requests reconsideration of the rejections issued in the Advisory Action. Applicant submits that there are persuasive arguments as to why the combination of the cited prior art references are deficient in creating a prima facie case of obviousness. Further, the analysis provided in rejecting the claims has not analyzed certain claim amendments that were previous provided to distinguish the prior art, or analyzed limitations that are not even recited.

Because various arguments presented by the Applicant have not been addressed, and certain limitations have not been shown to be in the prior art, Applicant respectfully requests that the rejection be withdrawn and allowance be granted.

Applicant has focused the discussion herein to the arguments filed in the April 27, 2009 response, and the Examiner's response thereto. These comprise four main arguments (identified by Roman numerals I – IV), any of which if accepted, would distinguish the independent claims from the prior art cited by the Examiner, and result in allowance of some or all of the claims. Applicant's presumes there is no need to replicate the arguments in the April 27, 2009 response.

I.   Independent Claims 1, 9, and 19
("a staging server comprising computer readable medium for *storing* an asset")

The Examiner states in the Advisory Action:

The applicant argues that Carles does not disclose or teach "a staging server comprising computer readable medium for storing an asset." The applicant goes on to state that Carles does disclose that the server (figure 3, part 10 including CMMS 11) stores the smart commercials (Remarks, page 8). The issue here is whether the claim language or "storing an asset" means that the asset is actively received and stored as argued on page 9, or it means that the asset could be previously stored on the server. It is the opinion of the examiner that the language used by the applicant does not suggest that the asset is received and stored by the server as suggested by the applicant and the limitation can be met using Carles (figure 3).

1) Applicant Did Not State The CCMS Server 11 Stores The Smart Commercials (Advisory Action, page 2)

The Examiner alleges the Applicant admits "the server" (referring to the CMMS 11) stores smart commercials. This misstates Applicant's response as Applicant was arguing the alleged server in the prior art does not store anything.

The Examiner has not clearly identified which server in Carles corresponds to the recited "staging server." The text cited by the Examiner in Carles only references one server – the Commercial Message Management Server (CMMS) 11. Hence, Applicant can only conclude the Examiner is alleging the CMMS 11 server is the "staging server."

In response, Applicant noted that this could not be correct because Carles indicated the Commercial Messages Library 38 stores the smart commercials, not the CMMS Server 11. This point is clearly made in Applicant's prior response, replicated below:

> It is readily apparent that the only server disclosed in the cited text is a "Commercial Message Management Server (CMMS)." However, Carles discloses that the "smart commercials" are stored in the Commercial Messages Library 38 of FIG. 3, shown below (see, col. 3, line 19-20) which is distinct from the CMMS:
>
> [figure removed]
>
> Carles discloses that the CMMS produces a set of subscriber addresses, but this is not "storing" an asset.

Presuming that the Examiner is referring to the smart commercial as the asset, Carles discloses the Commercial Messages Library, **a different** entity from the CMMS 11, stores the smart commercials. Thus, Applicant argued that the allegation that the CMMS Server 11 is the "staging server" is deficient, because the limitation recites "storing" an asset, and the text cited does not disclose the CMMS 11 storing anything. Thus, Applicant did not admit that the CMMS 11 server stores an asset.

Applicant maintains that a persuasive argument rebutting the allegation has been presented. Namely, the Examiner alleges the CMMS 11 server meets the "staging server" limitation, and Applicant has shown that alleged portion of Carles disclosing the the CMMS 11 server does not meet the "storing an asset" limitation. The only disclosure pointed to by the Examiner is that the CMMS 11 server uses information from the smart commercial to produce a set of subscriber addresses. (Carles, col. 3, lines 21-28). There has not been any persuasive argument from the Examiner as to why the CMMS 11 meets the "storing an asset" limitation. On the other hand, Applicant has shown that another entity stores the smart commercial, suggesting that the CMMS 11 server does not store it.

2) The Issue Is Not Whether The Claim Language Means The Asset Is Actively Stored (Advisory Action, page 2)

The Examiner stated in the Advisory Action that "the issue here is whether the claim language or "storing an asset" means that the asset is actively received and stored…or it means that the asset could be previously stored on the server." (AA, page 2.)

The Examiner misinterprets Applicant's arguments. Applicant argued that the CMMS 11 server does not meet the limitation of "storing an asset" as alleged, because the CMMS 11 server does not store smart commercials. The Examiner has implicitly alleged the smart commercial is the asset, but the alleged text in Carles does not disclose the CMMS 11 storing the smart commercial. Rather, the text just preceding that cited by the Examiner discloses that the smart commercials are stored in the Commercial Messages Library 38 of FIG. 3.

As noted by Applicant, the text cited by the Examiner in the Office Action only discloses that the CMMS 11 uses the embedded information in the smart commercial to "produce a set of subscriber addresses...." Applicant maintains that the CMMS 11 does not store the smart commercial, and hence the allegation that the CMMS 11 meets the "storing an asset" allegation is flawed.

3) The Examiner's Argument of Obviousness based on Carles is insufficient.

Applicant has provided objectively persuasive arguments, which were not addressed by the Examiner, namely that the CMMS 11 server is not the "staging server comprising computer readable medium for storing an asset."

It appears that the Examiner has misunderstood Applicant's arguments. Presuming that the Examiner is alleging the smart commercial is an asset, it is not the CMMS 11 server which stores the asset, but the Commercial Messages Library. The Examiner has not rebutted this argument by showing any evidence to the contrary in Carles. Since the wrong server has been identified in Carles, the use of Carles for illustrating this limitation is deficient, and the other references have not been alleged to disclose this limitation. Hence, the only logical conclusion is that a prima facie case of obviousness has not been established. Consequently, Applicant requests that the obviousness rejections for claims 1, 9, and 19 (and their dependent claims) be withdrawn.

II. The Examiner has not addressed the limitation and arguments involving "an application program identifier identifying an application program executing in a cable headend associated with processing the asset"

In the response dated Dec. 16, 2008, Applicant amended claim 1 (and others) to recite "application program identifier identifying an application program <u>executing in a cable headend</u>." (amended text shown in underline). One argument provided by Applicant is repeated below:

First, Flickinger clearly discloses the "STB" (Set Top Box) as processing the tag. This does not disclose the limitation "identifying an application program executing **in a cable headend**."

The Examiner's response alleges that the term "program" was added in the latest response and argued as distinguishing the claim from the prior art. **This is incorrect** – the term "program" was already present in the claims at this point as it was added in an amendment dated May 6, 2008 (in one form) and December 16, 2008 (in another form). Rather, Applicant amended the claim in the prior response by adding the limitation "executing in a cable headend."

Thus, Applicant did amend the limitation to better clarify the invention and distinguish the prior art – namely that the application program is "executing in a cable headend." This is in distinction to Flickinger, which does not disclose any application program **in the headend**. All references to Flickinger by the examiner (par. 56 and 74) refer to the set top box. The response by the Examiner does not address this claim amendment, but mistakenly alleges the limitation "program" was added. Thus, Applicant's amendments and arguments were not considered by the Examiner, but rather the Examiner presumes Applicant is rearguing a previous position.[1] Applicant submits that the amendment and arguments have not been considered and are distinguishable over the prior art.

Second, Applicant also argued that claim 9 was amended to recite a "first application program executing in the cable headend" and a "second application program executing in the cable headend." Applicant noted that the cited text in Flickinger does not disclose two application programs[2], and this distinction remains unaddressed by the Examiner.

In summary, Applicant's amendments to distinguish the prior art remain unaddressed. Because the Examiner addressed a previously added limitation, and not the new claim limitations added, Applicant submits the rejection on obviousness should be withdrawn.

III. The Examiner's Characterization of the Prior Art Supports the Applicant's Arguments

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[1] For the record, Applicant disagrees that the Examiner's characterization of the Applicant's prior response, the recollection of the interview and the purpose of the application identifier.
[2] Applicant disagrees that Flickinger discloses even one application program.

["**identifies the content server from among a plurality of contents servers to receive the content form the staging server.**"] **(AA, page 3)**

The claim limitation involves identifying the content server **to receive** the content from the staging server. Thus, the **receiving or destination server from a plurality of servers is identified**.

However, the Examiner admits the prior art Carles discloses "the server identification code teaches identifying which of a plurality of servers that the asset was received **from**." In other words, in Carles, the server identification code is used to identify the originating server sending information, not the server to receive the information.

Applicant understands the Examiner's position as alleging Del Sesto teaching use of a server identification code (Del Sesto col. 9, lines 34-35.) Applicant notes, however, this is information sent from the headend to the set top box (a.k.a. "BR" or broadcast receiver). (Id, col. 9, lines 25-35). Del Sesto does not disclose that the STB comprises multiple servers, and that the server identification code indicates to the STB which server in the cable headend **sent** the information to the STB. Hence, the "server identification code" identifies the originating server in the headend.

The Examiner also takes the position that Carles discloses a staging server and a content server. (Advisory Action, page 3, referring to prior OA, page 5). The prior OA referenced alleges that server 11 in Carles is the staging server and server 10 is the content server. However, only **one content server** is alleged to be disclosed.

The Examiner then combines the originating server identification code with a single destination content server, and finds that the limitation is rendered obvious ("identified the content server **from among a plurality of content server to receive the** content from the staging server.")

Since the prior art does not disclose multiple content servers, nor teaches an identification code that identifies the destination server, the obviousness argument is deficient. The server identification code in Del Sesto is used to identify the originating server, not the destination server. Further, Carles does not disclose multiple servers. The combination cannot render obvious the claim limitation.

Applicant amended the claims to recite "plurality of content servers" in a Response dated December 16, 2008 to overcome the prior art. The final OA dated Feb. 27, 2009 did not address this amendment, but rejected the claims based on Carles disclosure of a single content server. The Response dated April 27 argued this point again, and the Advisory Action dated May 26, 2009 essentially admits that the code is used to indicate where the asset was received **from**, not **to where** it is sent. Further, no evidence of a plurality of content servers in Carles is presented.

Applicant submits that the limitation, which was previously made, distinguishes the prior art, and that the prima facie case of obviousness has not been made, and that the rejection be withdrawn.

IV. A SET TOP BOX IS NOT A CABLE HEADEND (Advisory Action, page 3)
["an application program executing in a cable headend associated with processing the asset"]

Applicant presented compelling arguments in the Response dated December 16, 2008 that the prior art relied upon disclosed processing as occurring in a "BR" (broadcast receiver) or set top box. Thus, the limitations of "an application program executing **in a cable headend** associated with processing the asset" are plainly not met by the prior art. The final OA dated Feb. 27, 2009 did not analyze this limitation ("in a cable headend") at all, but nevertheless rejected the claims.

Applicant reiterated this argument in the Response dated April 27, 2009. The argument finally presented by the Examiner in the Advisory Action to refute this point is provided below:

> The applicant argues that the cited portion of Del Sesto (column 9, lines 25-50) refers to the BR (or broadcast receiver) and not the server. As the data is a type of metadata to be interpreted and decoded by a computer (in this case a broadcast receiver), it would have been obvious for one of skill in the art to use the data structure taught by Del Sesto in the data disclosed by Carles and Flickinger.

> Applicant finds the argument inapplicable for the following reasons:

1) The claim limitations at issue do not recite "data" or "metadata." Thus, the prior art's disclosure of data or metadata is not relevant to disclosing the claim limitations at hand.

2) These limitation "application program" was indicated as being found in claim 9, 1 and 19. These claims variously recite limitations such as "metadata" and "data related to the content" in addition to "application program." This requires that the limitation "application data" be distinct from the other limitations in claims 1, 9, and 19. Thus, "application data" is not the same as "metadata" or "data related to the content." There is no potential argument that the prior art's disclosure of data or metadata somehow renders obvious the limitation "application program" because these are distinct.

Applicant has made repeated arguments based on amendments in the above limitation that distinguish the prior art, and these amendments and limitations have not been addressed in the final OA. Further, the Advisory Action reasoning is facially deficient as the recited limitations ("application program") have not been analyzed, but rather, substituted limitations ("data" and "metadata") have been analyzed. In summary, the claimed limitations have not been analyzed, and nor shown to be found in the prior art.

Summary

Applicant has made various amendments in prior Responses which were not analyzed in prior Office Actions. Further, at this stage, the Advisory Action attempts to address these points, but in some instances still does not address the limitations, or addresses limitations that are not the basis of Applicant's argument. In other cases, Applicant submits that the reasoning provided is not sufficient to show the limitations are disclosed in the prior art.

Applicant submits that because a prima facie case of obviousness has not been made out, the additional time and expense of reiterating these same arguments during an RCE or Appeal should not have to occur. Because the independent claims are distinguished from the prior art, and that the dependent claims are distinguished as well, it is appropriate to allow the pending claims.

Request for Interview

Applicant further requests another interview in an attempt to resolve these issues should the Examiner believe the rejections should be maintained.

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CONCLUSION

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It is not believed that extensions of time or fees for net addition of claims are required, beyond those that may otherwise be provided for in documents accompanying this paper. However, in the event that additional extensions of time are necessary to allow consideration of this paper, such extensions are hereby petitioned under 37 CFR § 1.136(a), and any fee required therefor (including fees for net addition of claims) is hereby authorized to be charged to Deposit Account No. 16-0605.

Respectfully submitted,

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